314 U.S. 650

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

FEDERAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
LESTER ETTMAN,
Respondent.

No. 560

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

WAYNE ELY,
Tenth Floor, Commerce Bldg.,
St. Louis, Missouri,
Attorney for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Respondent.
No. .....

PETITION FOR A WRIT OF CERTIORARI.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Federal Life Insurance Company, a corporation, respectfully shows to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit in equity to rescind a policy of disability benefit insurance issued by petitioner in favor of respondent. The suit was originally filed in the United States District Court for the Eastern District of Missouri, and is based upon the proposition that respondent induced petitioner to issue the policy by making false and fraudulent representations in his application.

The value of the amount in controversy is in excess of the sum or value of $3,000.00. Upon respondent's motion to dismiss petitioner's bill of complaint, the said District Court entered an order and judgment of dismissal, from which judgment petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit, which Court of Appeals affirmed the judgment of the District Court. Petition for rehearing was denied and petitioner brings the case here by petition for a writ of certiorari.

THE FACTS.

The complaint of petitioner, filed July 13, 1940 (R. 3), alleges that on January 3, 1928, respondent made written application to petitioner for an insurance policy to provide indemnities of $300.00 a month for disability; that in his application respondent represented that he had never suffered from any difficulty with his eyesight, and had not consulted any physician or other practitioner for any ailment or disease since 1924, whereas, in truth and in fact, respondent was, at the time of signing and executing said application for said insurance policy, suffering from a degenerative disease of the eyes known as retinitis pigmentosa; that he had been suffering from said disease for a long time prior to the execution of the application, and that he had many times consulted and been treated by physicians for said disease and condition of his eyes; that said statements and representations by respondent were false and known by him to be false at the time he made them; that they were knowingly made for the purpose of deceiving petitioner and inducing petitioner to issue said policy of insurance, and with intent to deceive petitioner to believe that he was an insurable risk and was not suffering from any difficulty, disease or condition of the eyes; that petitioner was deceived by said false and fraudulent representations and that being so deceived petitioner exe-

cuted and issued said policy, and that it would not have issued the policy of insurance had it known that the said statements and representations of respondent were false.

The complaint further alleges that on April 17, 1940, respondent notified petitioner that he was suffering from retinitis pigmentosa and had lost his eyesight as result thereof; that petitioner thereupon made an investigation, and on or about June 5, 1940, received information for the first time that respondent was suffering from retinitis pigmentosa at the time he applied for the policy, which information was confirmed to petitioner on July 11, 1940, on which last date petitioner, for the first time, had positive knowledge that respondent was, at the time of the execution of said application and for several years prior thereto had been, suffering from retinitis pigmentosa, whereupon petitioner forthwith and on July 12, 1940, tendered respondent restitution of the premiums paid by him to petitioner, together with interest thereon, and demanded return of the policy, which said offer of restitution and tender of payment respondent refused and likewise refused to render up said policy.

The complaint further alleges that under the rules of the Insurance Departments of Missouri and Illinois and in accordance with sound actuarial practices and principle, it was required to and did on April 17, 1940, set up a reserve of $3,750.00 on said policy pending determination of its liability thereunder. Petitioner deposited into the registry of the court $1,406.13, representing the premiums paid by respondent on said policy and interest thereon from the dates of payment to the date of the deposit (July 13, 1940); alleged that it had no adequate remedy at law, and prayed that said insurance policy be rescinded and set aside, and prayed that respondent be forever restrained and enjoined from setting up or claiming any right or in-

terest under said policy and from claiming any benefits thereunder.

The complaint alleges that the value of the amount in controversy between petitioner and respondent is in excess of the value of $3,000.00, exclusive of interest or costs. A photostatic copy of respondent's application is marked "Exhibit A," attached to the complaint and made a part thereof, and a photostatic copy of the policy issued in response to said application is marked "Exhibit B," attached to the complaint and made a part thereof.

On July 24, 1940, respondent filed a suit at law in the Circuit Court of the City of St. Louis, Missouri, against petitioner (R. 28), alleging issuance of the said insurance policy by petitioner in January, 1928; that the policy provided for a monthly indemnity of $300.00 to respondent in the event of the loss of his eyesight as a result of accidental injury or sickness; that he lost the sight of both eyes in January, 1936, and that petitioner was indebted to him in the sum of $16,200.00 at the time of filing said suit at law, and prayed judgment for said amount, together with 10 per cent penalty, and an attorneys' fee of $3,000.00.

Said suit at law was duly removed by petitioner from said Circuit Court to the said United States District Court for the Eastern District of Missouri.

On August 6, 1940, respondent filed a motion in the United States District Court for the Eastern District of Missouri to dismiss petitioner's complaint in equity (R. 25), on the grounds (1) that petitioner had an adequate remedy at law; (2) that the controversy upon which the policy became payable occurred prior to the filing of suit by petitioner; (3) that if petitioner has a defense it could assert the same at law; (4) that the suit at law filed by respondent in said Circuit Court was pending and that

all the issues between the parties could be decided therein; (5) that petitioner's complaint is without equity.

On December 19, 1940, the said District Court sustained respondent's motion to dismiss petitioner's complaint in equity, and entered an order and judgment of dismissal of said complaint (R. 26). Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and on the 24th day of June, 1941, the said Circuit Court of Appeals affirmed the judgment of said District Court (R. 46). Petition for a rehearing was denied on July 28, 1941 (R. 53), and petitioner brings the case here by petition for writ of certiorari.

The case was briefed, argued and submitted to the United States Circuit Court of Appeals and was argued orally before said court on May 7, 1941.

In its brief and at the oral argument petitioner complained to the said Circuit Court of Appeals that the District Court erred in dismissing petitioner's bill of complaint; that petitioner does not have an adequate remedy at law; that it was entitled to a trial of the issues raised by its bill of complaint; and that it was error for the District Court to dismiss the petition without hearing the case on its merits, and petitioner, in its said brief, filed in said Circuit Court of Appeals, presented to said Court for its determination and decision the following propositions of law in the following language:

> "I. The Court erred in dismissing the plaintiff's petition in its suit to rescind the policy.
>
> "This was an equity suit to rescind and set aside a policy of insurance on the ground that the policy was procured by the making of false and fraudulent representations of fact, and the making of incomplete and untrue answers to certain pertinent questions in the

application for the policy, which amounted to legal fraud; that the matters misrepresented were material, and affected the acceptance of the risk and the hazard assumed by the Federal Life. The petition sets forth that the Federal Life only recently discovered the fraud, and promptly tendered a return of the premiums paid and demanded a return of the policy, which was refused; and alleges that the Federal Life will suffer an irreparable injury unless afforded relief in equity. The petition, therefore, states a cause of action and presents an issue which the Federal Life is entitled to have tried."

"II. The plaintiff, Federal Life Insurance Company, does not have an adequate remedy at law.

"(a) The insured is living and there is consequently no possible way in which plaintiff can secure the full relief to which it is entitled except in equity."

"(b) At the time the Federal Life Insurance Company filed its petition in this case no suit on the policy had been instituted, and the company therefore could not set up as a defense the facts showing nonliability."

"(c) The judgment in favor of the Federal Life in the law action brought by Ettman after this suit was filed would not afford the Federal Life the relief to which it is entitled under the allegations in its suit to rescind the policy, and such judgment would not be res judicata in a subsequent suit upon the policy by Ettman unless the jury should find in such subsequent suit that the matter misrepresented in procurement of the policy actually contributed to the contingency or event giving rise to such subsequent suit."

"III. The Federal Life is entitled to trial of the issues raised by its petition filed in this case, and it was error for the Court to dismiss the petition without hearing the case on its merits.

"The sole question presented by Ettman's motion to dismiss this suit was whether plaintiff's petition, construed in the light most favorable to plaintiff,

stated a claim upon which relief could be granted. This question can only be decided after a trial on the merits."

Petitioner herein, appellant in the Circuit Court of Appeals, cited cases and authorities for each of the above propositions of law and argued said propositions and complained of each of them to the said Circuit Court of Appeals.

On June 24, 1941, the said Circuit Court of Appeals filed its opinion affirming the judgment of the District Court, in which opinion said Court of Appeals held:

"that the contingency upon which the plaintiff became liable on the policy had occurred and defendant was asserting a liability against the plaintiff based upon the policy. The question which we have to decide is not whether the plaintiff has stated in its complaint a good defense to the policy, but whether it can now invoke the equitable jurisdiction of the court, and this, in turn, is dependent upon whether it has an adequate remedy at law" (Rec. p. 44).

"Defendant has the opportunity in the action at law to contest its liability. The defense of fraud and misrepresentation being available as a defense to the action at law, the bill in equity cannot be entertained to cancel the policy" (Rec. p. 44).

"* * * the contingency has happened which definitely and permanently fixes the liability of the insurance company. The policy covered only a monthly indemnity in the maximum amount of $300.00 per month. The liability for this indemnity had already occurred prior to the commencement of the suit in equity, and that liability could not be increased by any subsequent contingency. The policy provides that:

" 'The Monthly Indemnity of this Policy is $300.00. If the Insured shall suffer the Loss of Both Hands or of Both Feet or of One Hand and One Foot or of the

Sight of Both Eyes as a result of accidental injury or sickness, such loss shall be deemed to cause thereafter a permanent loss of all of his business time and the Company will pay said monthly indemnity as long as he shall live.'

"Under these circumstances, the obligation to pay became fixed and absolute. Thereafter, the monthly indemnity became legal demands. To these legal demands the plaintiff may plead the defense of fraud and misrepresentation, and if that issue should be sustained, the judgment establishing fraud in the procurement of the policy would be *res judicata*, which can be availed of as to all subsequent claims for indemnity" (Rec. pp. 45, 46).

On July 8, 1941, petitioner filed its motion for a rehearing in said Circuit Court of Appeals in which it presented to said Circuit Court of Appeals the following propositions of law in the following language:

"I. The contract of insurance with which we are here concerned is a Missouri contract, and the validity of any claim must be determined by the laws of Missouri" (R. 47, 48).

"II. Furthermore, the decision of this Court that 'the defense of fraud and misrepresentation being available as a defense to the action at law, the bill in equity cannot be entertained to cancel the policy,' is contrary to the decisions of the Missouri courts" (R. 49).

Petitioner cited cases and authorities for each of the propositions of law presented to the Court in its said motion for a rehearing, but said Circuit Court of Appeals overruled petitioner's said motion for a rehearing on July 28, 1941.

Petitioner submits that the said Circuit Court of Appeals committed error in deciding said propositions of law so

presented to it by petitioner both in petitioner's original brief filed in said court and in its motion for a rehearing. Wherefore, petitioner presents to this Honorable Court the following questions:

QUESTIONS PRESENTED.

I.

Is an insurance company entitled to invoke the equitable jurisdiction of a United States District Court to cancel or rescind a policy of insurance issued by it in response to false and fraudulent representations and statements made by the assured, when such false and fraudulent representations are material to the risk insured against?

II.

Does the opportunity of an insurance company to contest an action at law to recover under a policy of disability insurance, on the ground that the policy was procured through fraud and misrepresentation material to the disability claimed deprive the insurance company of its right to maintain a bill in equity to cancel the policy?

III.

Where an insurance company defends against a suit of law to collect disability benefits under an insurance policy on the ground that the policy was obtained through fraud and misrepresentation, material to the disability claimed, will a judgment establishing fraud in the procurement of the policy bar any and all subsequent claims for indemnity under the policy, without a showing that the fraud practiced in the procurement of the policy is material to the contingency upon which said subsequent claim is based?

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals that petitioner's bill in equity cannot be entertained to cancel the policy because petitioner has the opportunity to defend against the action at law brought by respondent after institution of the equity suit, and to contest its liability in the law action on the ground that the policy was procured through fraud and misrepresentation is in direct conflict with the decisions of the Supreme Court in **American Life Insurance Company v. Stewart**, 300 U. S. 203, 81 L. Ed. 605; **Dawson v. Kentucky**, 255 U. S. 288, 296, 41 S. Ct. 272, 65 L. Ed. 638; Cf. **McClellan v. Carland**, 217 U. S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762; **Clements v. Macheboeuf**, 92 U. S. 418, 23 L. Ed. 504, and **Metcalf v. Williams**, 104 U. S. 93, 26 L. Ed. 665, 666.

(a) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of other Circuit Courts of Appeals:

Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4), 292 F. 53, 54-56;
Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A. 5), 294 F. 886, 888 (3);
New York Life Ins. Co. v. Seymour (C. C. A. 6), 45 F. (2) 47, 49 (4);
Densby v. Acacia Mutual Life Ins. Co. (C. C. A. D. C.), 78 F. (2) 203, 206 (5).

(b) The said decision of the Circuit Court of Appeals is in direct conflict with its own prior decisions in the following cases:

Lincoln Nat. Life Ins. Co. v. Hammer (C. C. A. 8), 41 F. (2) 12, 16 (1 and 2);

Terry v. New York Life Ins. Co. (C. C. A. 8), 104 F. (2) 498, 500;
Leimer v. State Mutual Life Assurance Co. (C. C. A. 8), 108 F. (2) 302.

(c) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of the Supreme Court of Missouri and the Missouri Courts of Appeals:

Hanson v. Neal, 215 Mo. 256, 279, 114 S. W. 1073, 1080, 1081 (18);
New York Life Ins. Co. v. Cobb, 219 Mo. A. 609, 282 S. W. 494, 497 (3).

(d) In failing and refusing to apply the law of Missouri in determining the right of petitioner to maintain its bill in equity in this case, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court in **Erie Railroad Company v. Tompkins,** 304 U. S. 64, 78, 58 Sup. Ct. 817, 82 L. Ed. 1188, 1194, and in **Chicago & A. R. Co. v. Wiggins Ferry Company,** 108 U. S. 18, 27 L. Ed. 636.

II.

The decision of the Court of Appeals that a judgment in the suit at law establishing fraud in the procurement of the policy would be res judicata as to all subsequent claims for indemnity is in direct conflict with its own prior decision in **Terry v. New York Life Ins. Co.,** 104 F. (2) 498, 501-502 (beginning with last paragraph on p. 501).

(a) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of the Supreme Court of Missouri and the Missouri Courts of Appeals:

Aetna Life Ins. Co. v. Daniel, 328 Mo. 876, 42 S. W. (2) 584, 588 (10);

Schuermann v. Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723;
Birch Tree State Bank v. Dowler, 167 Mo. A. 373, 151 S. W. 784, 785 (2, 3);
Smith v. Dye, 88 Mo. 581;
O'Malley v. Northwestern Mutual Life Ins. Co., 231 Mo. A. 39, 95 S. W. (2) 852, 858. Certiorari denied (1936) **Northwestern Mutual Life Ins. Co. v. O'Malley**, 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, and that the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
Tenth Floor, Commerce Bldg.,
St. Louis, Missouri,
Solicitor for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 41 to 46 of the record. The order affirming the judgment of the District Court is at page 46, the order denying the motion for a rehearing is at page 55 of the original record and page 53 of the copies filed, and the certificate of the Clerk of the Court of Appeals is at page 58 of the original record and at page 54 of the copies.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, now being Section 347 (a), Title 28, U. S. Code.

2. The date of the judgment of the trial court is December 19, 1940 (Rec. p. 26). An appeal was duly perfected and there was a judgment in the Circuit Court of Appeals on June 24, 1941 (Rec. p. 46). Motion for a rehearing was overruled by the Circuit Court of Appeals on July 28, 1941 (Original Rec. p. 55, Copies p. 53).

III.

STATEMENT OF THE CASE.

In the petition, at pages 2 to 9, is a full statement of the case so far as the law and the facts are material to the consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that petitioner's bill in equity cannot be entertained to cancel the policy.

2. In holding that judgment in the suit at law, establishing fraud in the procurement of the policy would be res judicata which can be availed of as to all subsequent claims for indemnity.

V.

SUMMARY OF ARGUMENT.

A.

Specification of Error I.

The reason assigned by the Circuit Court of Appeals for its holding that petitioner's bill in equity cannot be entertained to cancel the policy, is because the contingency upon which petitioner became liable on the policy had occurred before the suit in equity was filed; that respondent was asserting a liability against petitioner based upon the policy, and that petitioner has the opportunity in the action at law to contest its liability on the ground that the policy was procured through fraud and misrepresentation.

The decision is erroneous for several reasons: (1) The contract of insurance is a Missouri contract, and must be construed according to the laws of Missouri. Under the laws of Missouri, fraud and misrepresentation in the procurement of an insurance policy is not a defense to an action to recover under the policy for any disability insured against, unless the fraud and misrepresentation is material to the disability claimed by the policyholder. The question of whether fraud and misrepresentation in the procurement of a policy is material to the disability asserted is, under the laws of Missouri, a question for the jury. The policy is still in force. No claim is made by petitioner's bill in equity that respondent misrepresented any facts in his application except as to the disease and condition affecting his eyesight, and as to consultation with and treatment by physicians and other practitioners for such disease and condition. If, therefore, respondent should suffer a disability covered by the policy, but not connected with nor brought about by the disease or condi-

tion of his eyes, the fact that respondent had falsely and fraudulently misrepresented the facts as to the condition of his eyesight would not be available to petitioner as a defense against an action for such unrelated disability; (2) petitioner's remedy in the pending law action is not complete and adequate, and no adequate remedy is available to petitioner except by the suit in equity filed by it; (3) respondent's motion to dismiss petitioner's bill in equity is directed to the sole proposition that said bill in equity fails to state a cause of action or a claim upon which relief can be granted. The bill in equity does state a cause of action upon which relief can be granted, and, therefore, petitioner is entitled to a trial of the issues raised by its bill.

American Life Insurance Company v. Stewart, 300 U. S. 203, 81 L. Ed. 605;

Dawson v. Kentucky, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638;

Cf. McClellan v. Carland, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636;

Leimer v. State Mutual Life Assurance Co. (C. C. A. 8), 108 F. (2) 302;

Lincoln Nat. Life Ins. Co. v. Hammer (C. C. A. 8), 41 F. (2) 12;

Terry v. New York Life Ins. Co. (C. C. A. 8), 104 F. (2) 498;

Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4), 292 F. 53;

Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A. 5), 294 F. 886;

Densby v. Acacia Mutual Life Ins. Co. (C. C. A. D. C.), 78 F. (2) 203;

Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073;

New York Life Ins. Co. v. Cobb, 219 Mo. A. 609, 282 S. W. 494.

B.

Specification of Error II.

The holding of the Circuit Court of Appeals that judgment in the law action establishing fraud in the procurement of the policy would be res judicata as to all subsequent claims for indemnity is erroneous. The true rule, as followed by the federal courts and the courts of Missouri, as stated by the Circuit Court of Appeals for the Eighth Circuit in a case where the argument was advanced that a judgment in a law action "establishing fraud in the procurement of the policy would be res judicata in any action * * * under the double indemnity provisions of the policy." The Circuit Court of Appeals said:

> "Assuming that a judgment in the law action now pending should establish the fact that the insured obtained the policy by means of fraudulent representations in the application, that fact in subsequent suit upon the policy by the insured * * * will be immaterial unless a jury also finds that the matter misrepresented actually contributed to the contingency or event on which the policy becomes payable. Under these circumstances it cannot be said that the insurer's remedy is complete and adequate in the pending law action."
>
> **Terry v. New York Life Insurance Co.**, 104 Fed. (2d) 498, 500.

Missouri cases announcing the same rule are:

Aetna Life Ins. Co. v. Daniel, 328 Mo. 876, 42 S. W. (2) 584;

Schuermann v. Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723;

Birch Tree State Bank v. Dowler, 167 Mo. A. 373, 151 S. W. 784;

Smith v. Dye, 88 Mo. 581.

would bar any future claim under the policy.

ARGUMENT.

I.

The Fact That Petitioner May Defend Against Respondent's Action at Law on the Ground That Respondent Procured the Policy Through Fraud and Misrepresentation Does Not Deprive Petitioner of Its Right to a Trial on the Merits of Its Bill in Equity to Rescind the Policy.

The Court of Appeals has erroneously decided that a successful defense against respondent's action at law, on the ground that respondent was guilty of fraud and misrepresentation in the procurement of the policy. Before petitioner would be entitled to a judgment in respondent's action at law to collect indemnities for disabilities resulting from the loss of respondent's eyesight, petitioner would have to establish not only that respondent procured the policy through fraud and misrepresentation, but that the particular fraud and misrepresentation practiced by him contributed to the loss of his eyesight, because both the Federal Courts and Courts of Missouri have consistently held that an insurance company will not be relieved from paying indemnity under a policy issued by it on the ground that the policy was procured through fraud, unless the fraud was material to the risk insured against, and actually contributed to bring about the contingency or circumstance upon which a claim of liability is based. To illustrate, the policy involved in this case provides for the payment of monthly indemnities for disability resulting from the loss of both hands, both feet, or of one hand and one foot, as well as for the loss of the sight of both eyes, provided that such loss is the result of accidental injury or sickness.

If, then, the respondent should lose both hands or both

feet, or one hand and one foot, as result of gout, gangrenous poisoning, gunshot wound, or any disease or accidental injury, and if the petitioner should refuse to pay the monthly indemnity on the ground that respondent had falsely and fraudulently misrepresented the condition of his eyes at the time he applied for the policy, such defense would avail petitioner nothing in a lawsuit by respondent to recover benefits for any such disability unless a jury should find that respondent's fraudulent misrepresentations concerning the condition of his eyes actually contributed to the loss of his hands or feet.

Under such circumstances, it appears that the decision of the Court of Appeals is wrong wherein it holds that petitioner's bill in equity cannot be entertained on the theory that *one of the contingencies* (the loss of respondent's eyesight) upon which the benefits under the policy might become payable had occurred before the suit in equity was filed, to wit: that respondent was asserting a liability against petitioner because of the loss of his eyesight, and that petitioner might contest its liability in that action on the ground of fraud and misrepresentation. The loss of respondent's eyesight is *not the only contingency upon which the policy issued by petitioner becomes payable*, and therefore the rights and liabilities of the parties for all time to come are not fixed simply by reason of the fact that respondent has lost his eyesight. There are many contingencies upon which the policy becomes payable, some of which are mentioned above.

The indemnities thus far mentioned are contained in part I of the policy under the paragraph entitled "Monthly Indemnity for dismemberment and loss of sight."

Part II of the policy provides for "Indemnity for loss of time from disability," and provides that "if the Insured shall be disabled by accidental injury or by sickness and by reason of such disability shall necessarily

suffer loss of business time, the Company will pay indemnity'' so long as the insured lives and continuously suffers loss of all business time, and provides further that in the case of partial loss of business time ''the Company will pay one-half said monthly indemnity for the continuous period of such partial loss of time not exceeding six months * * *.''

Thus, it is seen that the company is obligated by the terms of the policy to pay indemnity for loss of time resulting from disability caused by accidental injury or sickness of any kind. So, if respondent should lose his suit at law and should fail to collect indemnities for the loss of his eyesight and should thereafter contract pneumonia, tuberculosis, heart trouble, or any other disease that would cause him to lose time from his business, the petitioner would be forced to pay indemnity for such loss of time unless it could establish that the disability was directly related to the condition of respondent's eyesight existing at the time he applied for the policy.

Thus, it is clear that petitioner's opportunity to defend against respondent's suit at law does not afford petitioner a complete and adequate remedy in the premises, and that petitioner cannot be afforded a complete recovery in any action at law on the policy.

''When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief.''

Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, 666.

It has also been held that to warrant dismissal of a bill for want of equity it must clearly appear *from the allegations of the bill* that a cause of action does not exist.

Leimer v. State Mutual Life Assurance Company (C. C. A. 8), 108 Fed. (2nd) 302, 305.

II.

A Judgment in the Action at All Establishing Material Fraud in the Procurement of a Policy Would Not Be Res Judicata as to Subsequent Claims for Indemnity Under the Policy Without a Finding That the Fraud Practiced in the Procurement of the Policy Was Material to the Contingency Forming the Basis of the Subsequent Claim.

This proposition is so closely related to the proposition advanced under specification of error I, that additional argument seems unnecessary to establish it. What was said by the Circuit Court of Appeals in this case is directly opposed to its holding in **Terry v. New York Life Insurance Company**, 104 Fed. (2nd) 498, 500, that a judgment in a law action establishing the fact that a policy was obtained through fraud and misrepresentation would be immaterial in a subsequent suit upon the policy unless it be established in such subsequent suit "*that the matter misrepresented actually contributed to the contingency or event on which the policy becomes payable.*"

CONCLUSION.

From the above it seems clear that the rights of the parties are not fixed because the contingency upon which respondent bases his present action at law is not the only contingency upon which the policy might become payable; that under such circumstances it cannot be said that the remedy of petitioner is complete and adequate in the pending law action brought by respondent, and that petitioner cannot have a complete remedy except at equity. Therefore, it is respectfully submitted that petitioner is entitled to a trial on the merits of the issues raised by its bill in equity; that the decision of the Court of Appeals to the

contrary is in conflict with the decisions of the Supreme Court, with the decisions of the other Circuit Courts of Appeals, with its own prior decisions, and with the decisions of the courts of the State of Missouri.

Petitioner, therefore, prays that this petition for certiorari be granted, and that the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
Tenth Floor Commerce Building,
St. Louis, Missouri,
Attorney for Petitioner.

FILED
SEP 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,
Petitioner,
vs.
LESTER ETTMAN,
Respondent.
No. 560.

RESPONDENT'S BRIEF.

J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Attorney for Respondent.

LEAHY, WALTHER & HECKER,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,
Petitioner,
vs.
LESTER ETTMAN,
Respondent.
No. 560.

RESPONDENT'S BRIEF.

STATEMENT.

The policy in question was a health and accident policy issued in 1928 by petitioner. It provided, among other things, that the loss of the sight of both eyes should constitute total and permanent disability. The assured lost the sight of both eyes. He made claim for disability benefits. Thereupon the petitioner brought a suit in equity to cancel the policy claiming misrepresentation and false statements at the time of the application in 1928.

Then the respondent brought a suit in the state court to recover the benefits which were due him from the time of his disability. This was removed to the federal court, where the petitioner filed an answer to the lawsuit, pleading exactly the same facts that it pleaded in its suit to cancel the policy.

A motion to dismiss the petitioner's suit to cancel the policy (R. p. 25) was sustained by the trial court (R. p. 26) and affirmed by the Court of Appeals (R. p. 46).

POINTS AND AUTHORITIES.

A suit to cancel the policy will not lie either under the federal rule or under the Missouri rule where the contingency upon which the policy becomes payable has occurred.

Section 5732, R. S. Mo. 1929 (Mo. Ann. Statutes, p. 4373), now Sec. 5843;

Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723;

Emery v. N. Y. Life Ins. Co., 257 S. W. 162 (Springfield Ct. of App.), reversed on other grounds, 316 Mo. 1292, 295 S. W. 571;

Couch, Vol. 6, p. 5079, Par. 1433;

Couch, Vol. 6, p. 501, Par. 1418;

Couch, Vol. 6, p. 5023, Par. 1406;

American Surety Co. v. Dean (Mo. App.), 243 S. W. 415 (not officially reported);

Couch, Vol. 6, p. 5080;

Johnson v. Mutual L. I. Co., 293 U. S. 335 (70 Fed. [2d] 41);

Mueller v. John Hancock M. L. Ins. Co. (Mo. App.), 261 S. W. 709, affirmed on this point in

State ex rel. John Hancock M. L. I. Co. v. Allen, 313 Mo. 384;

DiGiovanni v. Camden Fire Ins. Assn., 296 U. S. 64, 80 L. Ed. 47;

Lumbermen's M. Cas. Co. v. Bagley (C. C. A. 10th), 62 Fed. (2d) 617;

N. Y. L. Co. v. Miller (C. C. A. 8th), 73 Fed. (2d) 350, 97 A. L. R. 562;

Aetna Life Ins. Co. v. Daniels, 42 S. W. (2d) 584, 328 Mo. 876;

Wollums v. Health & Acc. Assn., 46 S. W. (2d) 259, l. c. 262, 226 Mo. App. 647;

Enelow v. N. Y. Life, 293 U. S. 379;

Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188;

New York Life Insurance Co. v. Calhoun, 97 Fed. (2d) 896.

II.

The fact that other suits may be brought on the same policy is not such a multiplicity of suits as to warrant equity assuming jurisdiction. The judgment in the first case is res adjudicata.

Lumbermen's Mut. Cas. Co. v. Bagley, 62 Fed. (2d) 617;
Pacific Mutual L. Ins. Co. v. Parker, 71 Fed. (2d) 872 (C. C. A. 10);
28 U. S. C. A., page 256, par. 284;
Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501;
Griesa v. Mutual Life Ins. Co., 169 Fed. 509;
Aetna Life Ins. Co. v. Smith, 73 Fed. 318;
State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 267 S. W. 832;
Metropolitan Life Ins. Co. v. Erdwins, 229 Mo. App. 437, 83 S. W. (2d) 597.

III.

If petitioner has any defense, it has an adequate remedy at law. The respondent is entitled to a jury trial.

(See cases cited above, Points I and II.)

ARGUMENT.

In the "Questions Presented" set out on page 9 of the petitioner's petition for writ of certiorari and brief, the petitioner fails to set out under the three alleged questions presented **that the contingency upon which the policy became payable had occurred.**

It is indeed passing strange that the petitioner should tell this Court that there is a conflict between the decision of the Court of Appeals and this Court, and other Courts of Appeals, and cite numerous cases which petitioner contends support its position, and yet in its motion for rehearing (R. pp. 47-50) the petitioner should only cite one case which it now cites in the petition for certiorari, namely, the case of **Terry v. New York Life Insurance Company,** 104 Fed. (2d) 498. The other cases which are cited in the motion for rehearing are not cited in the petition for certiorari, and likewise the cases cited in the petition for certiorari, with the exception of the Terry case, are not cited in the motion for rehearing.

We have no disposition to analyze all the cases cited by the petitioner, because they are without application. There is not a single case that supports the legal position of the petitioner. For instance, in **Leimer v. State Mutual Life Assurance Company** (C. C. A. 8), 108 F. (2d) 302, the case was a law case, not a suit in equity. The question was whether there were sufficient facts stated to set out a case for relief. There was no question of the right to file a suit to cancel the policy.

In **Terry v. New York Life Ins. Co.** (C. C. A. 8), 104 Fed. (2d) 498, the policy contained an incontestability clause of two years. It also involved different parties, who would not be bound by the law action. The Court expressly recognizes the Missouri rule governing the con-

struction of insurance policies written in Missouri, and points out the special circumstances which take the Terry case out of the ordinary rule under which a suit to cancel the policy cannot be brought after the policy becomes payable. In the Terry case, if the assured became totally disabled before age 60, the company was to pay a monthly income of $35.00 to the assured, but if such disability resulted from insanity, payment was to be made to the beneficiary in lieu of the assured. At the time the policy was issued, the assured was single. He afterward married. In 1933 he entered into a settlement agreement with the company, whereby, upon his death, the proceeds of the policy should be paid to his wife in 144 monthly installments, and in case of her death before all the installments were paid, then to his son. In case of the death of both his wife and his son, the remainder was to be paid in one sum to his sister and brothers, share and share alike. In 1936 he was adjudged to be of unsound mind, and his wife was appointed guardian. She became entitled to receive all disability benefits in her own right as beneficiary, and not as guardian. Later in 1936 the insured, by his guardian, filed a suit at law seeking to recover the disability benefits from November, 1934, to December, 1936. The company's answer pleaded a general denial, and as an affirmative defense alleged that the assured had been insane during all the period of time during which disability benefits were claimed. It further pleaded that in the event of the insured's disability resulting from insanity the disability benefits were to be payable to the beneficiary, and therefore the guardian had no interest in the disability benefits and was not a proper party plaintiff. In 1938 an amended petition was filed in the action in the state court, substantially similar to the guardian's petition, except that the wife individually was also made a party plaintiff. The company brought a suit

in the federal court, naming as defendants the wife, both individually and as guardian of the assured, and naming the minor son as a defendant. The Court points out that there are peculiar circumstances in the case; that none of the beneficiaries named in the policy have vested interests, because the change of beneficiary was reserved in the policy by the assured, and the assured was insane. The Court in its opinion discusses the Missouri rule and quotes from the case of State ex rel. National Council v. Trimble, 292 Mo. 371, where the Missouri Supreme Court says:

> "It has been expressly decided in this state that after the death of the insured an action in equity to cancel the policy is not the proper remedy, and that when suit has been brought on the policy the insurance company cannot convert the action into a case in equity by alleging fraudulent misrepresentations in the procurement of the policy and praying for its cancellation." (Citing cases.)

Judge Thomas, who wrote the opinion in the Terry case, quotes from the case of Wollums v. Mutual Benefit Health & Accident Ass'n, 226 Mo. App. 647, 46 S. W. (2d) 259, as follows:

> "That after the happening of the contingency or event upon which the policy was to become payable, the rights and obligations between the parties become fixed and absolute and the sums insured become a purely legal demand, giving the parties the right to have the issues tried by a jury."

The Court in the Terry case then discusses the rule that a fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the parties or their privies. (Citing Missouri cases.) The Court in the Terry case then points out the special circumstances, saying:

"The defect in this argument is that in a future suit on the policy the parties may not include the plaintiff in the suit now pending in the state court. The insured may be killed in an accident covered by the double-indemnity provision of the contract. In the meantime he may change the beneficiaries entirely or Katherine L. Terry may predecease the insured. In either case the beneficiaries entitled to sue for recovery will be parties other than the parties to the action now pending in the state court. It is not claimed that such new or contingent beneficiaries are privies to the plaintiffs in the law action pending."

In the case at bar the only person interested is the insured, and if in a law case the issue is squarely presented and the company prevails, the insured will be barred from bringing any further proceeding. The matter will be res adjudicata. No one else would have any interest. The contrary will be true if the insured prevails. But in no event can the insurer have a policy canceled in equity after the occurrence of the contingency upon which it becomes payable, unless there is an incontestable clause or other special circumstances, as pointed out in the Terry case, supra. As pointed out in the Terry case, the rights and obligations between the parties become fixed and absolute and the sum now due to the assured is purely a legal demand giving the parties the right to have the issues tried by a jury.

The case of **Aetna Life Insurance Co. v. Daniel**, 42 S. W. (2d) 584, 328 Mo. 876, cited by the petitioner, contains an incontestable clause. The Missouri Supreme Court in that case held that there must be an allegation in the petition that no suit on the policy was instituted, and there must be a further allegation that the insurer could not set up as defenses the facts showing nonliability. The Supreme Court also held that a defense of fraud for misrepresentation is a legal defense triable by a jury, regardless of the

misrepresentation statute in Missouri, unless by some special circumstances the company is precluded from making the defense in a suit upon the policy.

In the case of **Di Giovanni v. Camden Fire Ins. Co.**, 296 U. S. 64, l. c. 68, this Court, speaking through Mr. Justice Stone, held:

> "The Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. Enelow v. New York Life Ins. Co., 293 U. S. 379, 79 L. Ed. 440."

Couch on Insurance, Vol. 6, p. 5079, Par. 1435, also lays down the rule that a suit in equity to cancel a policy does not lie after the rights of the parties have become fixed by a loss within the terms of the contract, also holding, page 5082, that the insurance company has an adequate remedy at law by way of defense to an action on the policy, and to hold otherwise would be a denial of the right to trial by jury.

See also **supplement** in **Couch**, governing paragraph 1435 et seq.

The policy itself is noncancelable, and provides (R. p. 12):

> "This policy cannot be cancelled, altered or amended unless with the consent of the assured."

The Missouri Misrepresentaton Statute, Section 5732, R. S. Mo. 1929 (Par. 6142, R. S. 1919), provides:

> "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed

to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Petitioner argues, as it argued in the Court of Appeals, that a judgment in a suit at law would not be res adjudicata as to future claims that the respondent might have for other injuries or other diseases, and it is further argued that such accident or diseases would not be a defense to any future action unless the said misrepresentations were material and contributed to the thing which caused his disability. The petitioner is asking this Court, as he asked the lower courts, to disregard the plain mandate of the Missouri statute making the issue triable to a jury. If such a thing could be done in this case, then the statute could be evaded in all cases where the matter allegedly misrepresented did not contribute to the contingency or event, and the Misrepresentation Statute would become a mere empty shell as to such cases. The statute provides, "and whether it so contributed in any case shall be a question for the jury."

The constitutionality of Section 5732, R. S. Mo. 1929 (now Sec. 5843), is no longer open to question.

Northwestern Mut. Life Ins. Co. v. O'Malley, 95 S. W. (2d) 860, certiorari denied 299 U. S. 585.

Furthermore, the **Federal Statute, Judicial Code**, 28 U. S. C. A., page 256, Par. 384, provides that no suit in equity shall be brought where there is an adequate remedy at law. The language is as follows:

"Suits in Equity, When Not Sustainable. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Under the Missouri law, even regardless of the Missouri Misrepresentation Statute, after the happening of the con-

tingency or event on which the policy became payable, the rights and obligations of the parties become fixed and absolute, and the sums due become purely legal demands, giving the parties the right to have the issues tried by jury.

> Wollums v. Mutual Benefit Health & Accident Association, 226 Mo. App. 647, 46 S. W. (2d) 259, 262;
> State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 214, 267 S. W. 832.

In the **Wollums case**, cited supra, the Court held that the only circumstances that will permit an insurance company to maintain a suit in equity to cancel a policy after the occurrence of the contingency making the policy payable is an incontestable clause in the policy.

The same rule is laid down in the case of **Metropolitan Life Ins. Co. v. Erdwins**, 229 Mo. App. 437.

To the same effect are the rulings in **Phoenix Assurance Co. v. Bailey**, 13 Wall. 616, 20 L. Ed. 501; **Enelow v. N. Y. Life Ins. Co.**, 293 U. S. 379; **Adamos v. N. Y. Life Ins. Co.**, 293 U. S. 386; **Aetna Life Ins. Co. v. Southern**, 306 U. S. 563; **Cable v. U. S.**, 191 U. S. 288.

In the **Enelow case**, cited supra, Chief Justice Hughes held that there was no merit in the contention that the remedy at law was not adequate because the petitioner was not the only person interested in the policy and that the premiums would be refundable to the decedent's executors. The case was remanded with instructions to try the case at law.

CONCLUSION.

It is obvious that the petitioner has no right to maintain an action in equity; it has a full and complete remedy at law. The contingency upon which the policy is payable has occurred. The claim has become a legal demand

triable to a jury, or, as the Court of Appeals in its opinion points out, the monthly payments became due, and then held:

> "Under these circumstances, the obligation to pay became fixed and absolute. Thereafter, the monthly indemnity became legal demands. To these legal demands the plaintiff may plead the defense of fraud and misrepresentation, and if that issue should be sustained, the judgment establishing fraud in the procurement of the policy would be res judicata which can be availed of as to all subsequent claims for indemnity."

Furthermore, the very fact that the petitioner has set out in its answer to the lawsuit exactly the same facts which it sets out in the suit to cancel, clearly indicates that it considers the legal defense as adequate.

The respondent is entitled to a jury trial, which the petitioner is seeking to avoid. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Attorney for Respondent.

LEAHY, WALTHER & HECKER,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.